

Rahim (Migration) [2020] AATA 333 (5 February 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Mohammad Rahim

CASE NUMBER: 1730999

DIBP REFERENCE(S): BCC2014/3367081 OSF2011/005417

MEMBER: Carmel Morfuni

DATE: 5 February 2020

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Statement made 5 February 2020 at 11.23am

1. **CATCHWORDS**

2. *MIGRATION – Partner (Migrant) (Class BC) – Subclass 100 (Spouse) – genuine spousal relationship – no longer spouses – financial commitments – insufficient evidence – marriage certificate provided – marriage not evidence of genuine commitment – decision under review affirmed*

3.

4. **LEGISLATION**

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), Schedule 2 cl 100.221, r 1.15A(3)

CASES

He v MIBP [2017] FCAFC 206

Singh v MIEA [1996] FCA 1429

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 22 November 2017 to refuse to grant the visa applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant applied for the visa on 8 December 2011 on the basis of her relationship with her sponsor who became an Australian citizen on 26 January 2001. (Df214). At that time, Class BC contained one subclass: Subclass 100 (Partner).
7. The criteria for the grant of a Subclass 100 visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
8. The delegate in this case refused to grant the visa on the basis that the applicant did not satisfy cl.100.221 because at the date of decision, the parties were no longer spouses as defined in Section 5F of the Act (Df258).
9. The applicant was granted a bridging Visa on 22 November 2017 (Tf46) and a subclass 309 visa on 20 November 2014 (Df179)
10. A department interview was conducted on 10 August 2014 in Afghanistan (Df181-206.)
11. The applicant applied for the review lodged on 7 December 2017 and again on 19 December 2017 (Tf37) to which a copy of the delegate's decision was attached.
12. In response to the hearing invitation, the Review applicant (being the visa applicant) requested a Dari (Farsi) interpreter and that:
 - he and the sponsor would attend the hearing
 - listed two third party witnesses would attend being his wife's sister and brother (Najiba SAHIL and Waid AZIM respectively indicating that both can attest that the parties are married).
13. The applicant appeared before the Tribunal on 17 January 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Gulalai HAZEEM, Najiba SAHIL and Waid AZIM.
14. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue in the present case is whether at the date of this decision, the parties are spouses as defined in s5F of the Act.

16.

17. Whether the parties are in a spouse or de facto relationship

18. Clause 100.221 requires that the applicant meet one of five alternative requirements. These include cl.100.221(2) and (2A) which require, among other things, that at the time of this decision, the applicant is the spouse or de facto partner of the 'sponsoring partner'. Unless the applicant was granted a Subclass 309 visa by Ministerial intervention, the 'sponsoring partner' is the person who was specified as the applicant's spouse or de facto partner or intended spouse or de facto partner in the related Subclass 309 application, being an Australian citizen, permanent resident or eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor, a 'sponsoring partner' within the meaning of that term.
19. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

20. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties produced a marriage certificate from Afghanistan indicating that they married on 17 October 2011 ((T62). The certificate is a photocopy together with other pages and noted that it is invalid without the seal of the court registrar which appeared on the certificate which appeared on the document. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met? - Regulation 1.15A (3)

- **(a) Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses**
 - the parties produced a letter from the Commonwealth bank of Australia dated 14 June 2016, 6 September 2018 indicating that they opened an account on that date with the bank. It is addressed to them at the Endeavour Hills property.

- In their supporting statutory declarations they indicated that they share day-to-day expenses however there is little evidence on file that that occurs including an analysis of the bank statement transactions. There is little evidence that the parties pool their resources and the parties' written statements.
- In their oral evidence they indicated that they held no real estate or other aid major assets jointly.
- They produced a joint lease of property since 2014. The oral evidence indicated that the visa applicant pays the rent and the bills. When asked about all sources of income the evidence indicates that the main source of income is a centre link payment received by the sponsor. The applicant stated that she previously received \$1200 per month but that was reduced to \$1000 after the parties married. When asked what sort of payment she received, the applicant stated it was either a sickness or disability payment. The sponsor stated in evidence that she receives \$1500 per month from centre link which is paid into the parties' joint account is \$1250 per month which she pays. The evidence indicated that she has an ANZ account in her name in which she has about \$700 and does not spend it. She was adamant that her centre link payments were new staff payments and had nothing to do with her health or disability. The evidence indicates that the rental on the property which the parties live is paid by the sponsor and she indicated in her evidence that when they fall short, her brother-in-law assists. The applicant did not indicate when asked by the Tribunal how the parties met the shortfall of any payments given that the rental exceeds the declared income coming into the house and any utilities and other expenses and that his brother-in-law assisted.
- When asked when the applicant last worked, she said in 2019 which is in direct contradiction to the applicant's evidence mentioned above. The review applicant heard the evidence given as he was present in the hearing room.
- There were also discrepancies in the evidence where he stated that the sponsor centre link payments with the only source of income that they received and when pressed, he stated that he has his own bank account with the CBA which has a balance of approximately \$5200. When asked where that came from, he said he sometimes asks the applicant and from previous work. He did not mention that they are assisted by the sponsor's brother and he is

waiting for his Visa to be able to apply for a Centrelink carer payment in order to care for his wife. The brother-in-law's evidence, confirmed that he assists the parties financially from time to time.

- The parties indicated in evidence that they have no joint liabilities other than the rent and utilities. In answer to a question from the Tribunal the visa applicant stated that when he works he gets paid daily but cannot remember the last time he worked, not able to provide a year but said that since 2014 he has worked approximately a total of six months and is paid daily in cash. As indicated, the sponsor said that he had worked some time in 2019.
- When asked whether or not they pool their resources, the visa applicant said no because he has no source of income and the sponsor stated that other than rent there were no other financial major commitments.
 - On the basis of the whole of the evidence before it including the internal inconsistencies of the Visa applicant's evidence alone, the Tribunal does not accept much of the evidence provided by him and concludes that the parties do not pool their resources. It further concludes, where inconsistency occurred with the evidence of the sponsor, it preferred the evidence of the sponsor. There was no evidence that the parties owe any legal obligation with respect to the other and that the sponsor meets the daily expenses. It concludes that the Visa applicant does not meet these criteria in the financial aspects of the relationship.

- **(b) Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.**

- The parties have no children with each other for whom they are responsible for their care and support.
- They live in a two-bedroom house which has a garden.
- The parties have produced a letter dated November 23, 2017 from a real estate agency indicating that since January 2015 they have been renting a property in Endeavour Hills together.
- In their statutory declarations dated 11 June 2016 the parties indicated that they live in a two-bedroom rented property and that they share the household work together such as shopping paying bills and other matters, and that the sponsor supports the applicant financially and

emotionally and is therefore her all the time and that their relationship is genuinely and, according to the applicant, *hopefully ongoing* (Df219), whereas the sponsor stated that the relationship is *ongoing and genuine* (Df222).

- The applicant said that he vacuums and cleans up outside including cutting the grass and washes the car and otherwise the parties share household duties. The sponsor indicated that the parties share the duties but she does the cooking and he does the vacuuming and shopping. There is otherwise little evidence that they share the household responsibilities other than they reside together on the same premises in a rented property.
- On the basis of the whole of the evidence before it the Tribunal concludes, on the whole of the evidence to conclude that the parties meet the requirements of the nature of the household.

● **(c) Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.**

- in their statutory declarations dated 11 June 2016 the parties declare to have been to a few weddings engagement parties' birthdays and other events celebrating their religious days
- The parties produced several photographs of the wedding and others of them together and with other people. The Tribunal found these photographs non-probative except in relation to the wedding itself.
- The parties produced statutory declarations in support of the relationship from themselves (Df220) & f223), from Frozan AZIMI, the applicant's brother-in-law sworn 13 June 2016 and another statutory declaration from him sworn 19 September 2017 indicating that the parties attend family functions and gatherings together and a happy and he believes relationship is ongoing and genuine; a statutory declaration from Shaffiullah ALIME a friend, and statutory declarations in support of their relationship from Shafiullah ALIME sworn 20.9.2017 (Df224). These were consistent with the oral evidence given by the witnesses at the hearing.

- On the basis of the whole of the evidence before it the Tribunal accepts that the parties present as a married couple and occasionally socialise with family and friends. It is not however satisfied by the third-party written statements which it found sparse as to details of the parties' relationship.
- **(d) Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.**
 - There is little written evidence of mutual emotional support and companionship and long term commitment given that the parties claim to have been together since 2011. There is little evidence of their long term plans other than the party stating that when the applicant receives his permanent Visa, he will look for work and the parties plan to buy a house. Given their limited incomes, notwithstanding some assistance from the sponsor's brother-in-law, there is no other credible evidence provided as to how they would manage to buy a house given that the evidence indicates that they have trouble managing on their current incomes.
 - The parties provided some third-party statutory declarations in support of the relationship as previously mentioned and a copy of the applicant's Will.
 - In oral evidence the applicant stated that the parties are married and support each other, they talk, show affection to each other and love each other. The sponsor stated that the applicant supports her by going with her to the doctor and gets her medicine and that they go shopping.
 - A genuine long term commitment depends on the subjective intentions of the parties. Marriage of itself is not evidence that the parties have a long-term or genuine commitment. Branson J stated in *Singh v MIEA* [1996] FCA 1429 at [13], [14] and [24]:
 - *“As the test of a genuine and continuing relationship involves consideration of the subjective intentions of the parties to the relationship, issues of the parties' credibility may assume particular importance...”*
 - *“...the test as to whether the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others involves considerations of subjective*

intentions of the parties to the relationship in relation to which, issues of credibility assume particular significance and which are crucial to a determination of whether or not what each party asserts about his or her commitment to the relationship can be accepted.

- Branson J also states:

- *..”a legally valid marriage which is a factor consistent with a mutual commitment and which will ordinarily be given significant weight, ...is not conclusive of the issue of whether the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others” and that “...the weight to be given in any particular case... is a matter to be determined by the Tribunal having regard to the totality of the evidence before it” (paragraph 14).*

- It follows that factors which may be consistent with a mutual commitment and which will ordinarily be given significant weight are not conclusive and are matters to be determined by the Tribunal having regard to the totality of the evidence before it.

- The Tribunal finds considering the whole of the evidence before it, that the criterion of the persons' commitment to each other including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term is not satisfied.

- **Any other circumstances of the relationship.**

- Nil

21. In relation to s.5F(2)(b)-(d) (mutual commitment to shared life to the exclusion of others; genuine and continuing relationship; and live together and not separately and apart on a permanent basis), the Tribunal finds that it is not satisfied that the parties meet the requirements of Section 5F(2)(b)-(d) at the date of decision.
22. Given these findings the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision
23. Therefore the applicant does not meet the requirements of cl.100.221(2)(b).
24. There were no claims made or evidence provided in relation to alternative criteria in cl.100.221(3) and (4) (death, family violence, child exceptions) and the Tribunal finds that they are not applicable in this case.
25. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

26. The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.
27. Carmel Morfuni
28. Member
- 29.
- 30.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and

- (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).